AND
BRIEFS

No. 15-1391

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IN THE

Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, et al.

Petitioners,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, RETAIL COUNCIL OF NEW YORK STATE, FLORIDA RETAIL FEDERATION, AND FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The assembled amici are trade groups representing retail merchants, including both the largest national stores and small, local retailers from states that have passed surcharge bans. Each amicus is described individually below, but they share a common interest in protecting merchants' First Amendment right to communicate effectively with consumers about the costs that contribute to the prices they pay. Through a wealth of experience, these retailers know that their customers are highly interested in cost avoidance, and that convincing them to change their choices happens most powerfully through well-considered decisions about how to frame and communicate the various pricing options that a consumer confronts in deciding what to buy and how to buy it. Amici ask the Court to reaffirm that such merchant decisions are protected speech because the "free flow of commercial information is indispensable .... to the proper allocation of resources in a free enterprise system ... [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Va. Bd. of Pharm. v. Va. Consumer Council*, 425 U.S. 748, 765 (1976). As it turns out, merchants may be unlikely to embrace credit-card surcharges as a matter of choice. But a matter of choice is what it should be, because laws that forbid truthful and non-misleading communication about pricing skew public perceptions of both commerce and policy in violation of the First Amendment.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, other than *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

Retail Litigation Center: The Retail Litigation Center, Inc. is a public policy organization representing national and regional retailers in the United States. Its members include many of the country's largest and most innovative retailers, employing millions of people throughout the United States and accounting for tens of billions of dollars in annual sales. The RLC identifies and engages in legal proceedings that have a national impact on the retail industry. It seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the industry-wide consequences of significant pending cases.

Retail Council of New York State: The Retail Council of New York State was incorporated in 1931 by a group of retailers looking to combine their interests and leverage their strengths to better support their businesses. Today, the Council is New York's largest full-service, statewide retail trade association. Headquartered in Albany, the Council serves the needs of merchants, professionals and other providers of goods and services across the state. Members range in size from sole proprietor businesses to national retail chains.

Florida Retail Federation: The Florida Retail Federation (FRF), is a not-for-profit 501(c)(6) Florida corporation and trade association representing the mutual interests of retail related businesses. Florida retailers annually provide more than $25 billion in wages, one of every five jobs in the State, and collect and remit $19 billion dollars in sales and retail related taxes. The FRF consists of over 4000 retailers in the State of Florida.

The Georgia Retail Association (a division of the FRF) represents over 170 retail companies operating

in the State. Retail supports 1 out of 4 jobs in Georgia and is directly and indirectly responsible for 78% of Georgia's gross domestic product.

The Florida Petroleum Marketers and Convenience Store Association (also a division of the FRF) represents over 230 companies operating in the petroleum and convenience store industries in Florida. Its mission is to protect the industry and advocate on its behalf by striving to promote policies that favor economic and business growth.

Food Marketing Institute: The FMI proudly advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores.

BACKGROUND

1. The fees that merchants pay to accept credit cards have a dramatic effect on both their bottom lines and the United States economy as a whole. These "swipe fees" are assessed as a percentage of every transaction conducted with a credit card; they are often two or three percentage points on each sale, and sometimes more for certain retail categories. For many merchants, swipe fees represent their highest cost of doing business after real estate, healthcare,

and payroll.[2] The banks and card companies that reap these fees make tens of billions of dollars each year in revenue from the system, even before one considers annual fees that they charge to cardholders, as well as interest, penalties, and other charges. *See generally* Adam Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1330, 1355 (2008); Terri Bradford & Fumiko Hayashi, Fed. Reserve Bank of Kansas City, *Developments in Interchange Fees in the United States and Abroad* (April 2008), https://www.kansascityfed.org/publicat/psr/briefings/%20psr-briefingApr08.pdf; 156 Cong. Rec. S4839 (June 10, 2010). It is an enormously profitable line of business—one that has only gotten more profitable over time, even as technology and returns to an ever-increasing scale have lowered the relevant costs of running a credit-card network.

One part of the reason the credit-card business is so profitable is no doubt the value of the product to purchasers and merchants; credit cards are very useful. But even valuable products should become less profitable over time. Basic economic theory holds that high profits should attract new entrants, and competition should drive down prices to purchasers—espe-

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[2] *See* Amex Tr. 386-87, 1222-23. Although it is supported by numerous underlying sources, much of the discussion below is cited to the trial record (Amex Tr.) and findings of the district court in the government's case against American Express. *See United States v. Am. Express Co.*, 88 F. Supp. 3d 143 (S.D.N.Y. 2015). While the Second Circuit has recently overturned that opinion on grounds related to market definition, *see United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016), the government has sought rehearing *en banc*, and the Second Circuit did not contest the factual findings relevant here.

cially where, as here, the costs of providing the product or service have remained the same or decreased. But that hasn't happened with the card networks; evidence from the antitrust case the U.S. Department of Justice recently brought against the card companies demonstrates that the card networks have been consistently *raising* their prices, and those price increases have landed in large part in the card companies' bottom lines. *See Am. Express*, 88 F. Supp. 3d at 195-98 ("[B]etween 2005 and 2010, American Express repeatedly and profitably raised its discount rates to millions of merchants across the United States as part of its Value Recapture initiative without losing a single large merchant and losing relatively few small merchants as a result.").

The problem is that there is little effective competition among the card companies, particularly when it comes to merchant swipe fees. Providing credit-card services to merchants is already a highly concentrated industry, there has been virtually no entry for decades, *id.* at 190, and the barriers to further entry are especially high. *See id.* at 189 (finding that this "market remains highly concentrated and constrained by high barriers to entry, just as it was in [*United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003)]"). There are only three players of serious consequence in the market—Visa, MasterCard, and American Express—and the only other company with a non-trivial role (Discover) has a market share below five percent. To be sure, there are a huge number of banks that offer credit cards to consumers through a whole host of credit-card products, but because they operate through the Visa and MasterCard networks, they do not compete at all over the prices charged to merchants to accept those cards. The highly concentrated,

non-competitive market that results is alone sufficient to lead to very high prices and what look (unsurprisingly) like monopoly profits in the charging of merchant swipe fees.

But that's not all. In the DOJ antitrust case described above, the United States (along with a large number of individual States) challenged a series of so-called "anti-steering rules" (ASRs) that the major card networks adopted in parallel, and that tend to further suppress competition among them. Visa and MasterCard abandoned these rules as a result of the Antitrust Division's suit, but American Express refused to do so, and the case went to trial. The government's evidence in that case showed that—even though each company adopted them individually and only American Express still imposes them—these anti-steering rules almost completely suppress interbrand competition among the card companies over merchant swipe fees, above and beyond the effect of high concentration in the industry. *See, e.g.*, *Am. Express*, 88 F. Supp. 3d at 207-08.

To make a long story short, Visa, MasterCard, and American Express have long forbidden merchants from engaging in *any* form of behavior that shows a preference for one form of payment over another when consumers get to the register: Merchants cannot, for example, offer consumers a discount for using less expensive forms of payment or even provide a special checkout lane for using cheaper alternatives to the highest-priced rewards cards. And while some of these rules have been abrogated by federal legislation and/or private antitrust settlements, American Express continues to generally prohibit merchants from steering customers to cheaper payment forms through its ASRs. Moreover, because contractual or settle-

ment terms continue to forbid merchants from treating one card company worse than any another, the American Express ASRs have the effect of broadly prohibiting merchants from steering to cheaper payment forms throughout the industry as a matter of contract.

According to the government's successful case (and in reality), the core problem created by the anti-steering rules is that they leave merchants with no way to encourage price competition among the card networks. *Id.* Merchants could theoretically try to resist such anti-competitive contract terms or negotiate for price breaks by threatening to drop any one of the major card companies, but experience has shown this to be impossible for most merchants in light of the competitive consequences of trying to go without customers who want to use Visa, MasterCard, or American Express.[3] (In other words, Visa, MasterCard, and American Express each have market power in their relationships with merchants). *See, e.g., Visa*, 344 F.3d at 239 ("We agree with the district court's finding that Visa U.S.A. and MasterCard, jointly and separately, have power within the market for network services."). Merchants' next best option is to try to encourage their customers to use cheaper cards at the register, which would allow them to reward card companies that charge less by turning more business their way. But the ASRs prohibit that practice, too, so that the card companies end up with no good reason at all to cut their prices to merchants. *See American Express*, 88 F. Supp. 3d at 207 (finding that ASRs "reduce American Express's incentive—as well as those

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[3] *See, e.g.*, Amex Tr. 208-09, 232-48, 389-90, 573-74, 1262-63, 1401, 1606-07, 1687-90, 2159-61, 2183, 2322-23, 2359, 2411-12, 2416, 3146-47, 6126.

of Visa, MasterCard, and Discover—to offer merchants lower discount rates").

A powerful example is provided by testimony from Discover at the government's *American Express* trial. Discover entered the credit-card industry pursuing a low-cost model—hoping to attract merchants into accepting the card by offering far lower swipe fees than its competitors at Visa, MasterCard, and American Express. This model may have helped Discover get its foot in the door, but it did not help Discover attract transaction volume. That is because ASRs prevent merchants from rewarding customers for using Discover at the register instead of its higher-cost alternatives. Discover thus abandoned its lower merchant swipe fees, because that price competition did not—indeed, *could* not—help it to capture market share. Supra-competitive swipe fees, which are then passed on in part to consumers, are the inevitable result of this kind of dynamic. *See id.* at 213-17 (explaining how ASRs "block low-cost business models" and "have resulted in higher prices to merchants and consumers").

A prohibition like the law at issue here—forbidding merchants from imposing a "surcharge" on the use of expensive cards, even while permitting them to offer a cash "discount"—is one kind of anti-steering rule that tends to create the same anticompetitive effect that the card companies have pursued themselves through their ASRs. That is because, if a merchant tells consumers that they are paying a "surcharge" based on the cost the merchant pays to accept a card, that could encourage consumers to use less expensive cards—or even to use debit cards, whose much lower prices are regulated by the Federal Reserve. Consumers might even want to get the best deal by using cash or personal checks, and the card companies might

lower their fees to merchants in order to avoid losing business through this form of competition. In this regard, state laws that prohibit labeling the cost of credit as a surcharge encourage the exact same kind of suppression of competition that the federal government is right now attempting to alleviate under the Sherman Act. And the ultimate effect of suppressed competition is, again, higher prices for merchants and their customers as well.

Simply put, state anti-surcharge laws are not consumer-protection legislation. They are, instead, anti-competitive, anti-consumer provisions that simply tend to increase card-company profits at the expense of merchants and their customers downstream. Indeed, laws that prohibit steering consumers away from expensive payment methods are special-interest legislation at its very worst—a giveaway to the card companies that protects an already highly concentrated and highly profitable industry from even the most basic levels of healthy competition.

2. Accordingly, it is no surprise that surcharge bans are the darlings of the credit card companies. As the petitioners explain at great length in their merits brief, these laws were sought by the card companies at the federal level first, and then at the state level when the federal ban lapsed in 1984.[4] *See* Petr. Br. 8-16. Genuine, well-established consumer-advocacy groups universally opposed these laws at both the state and federal level. Alongside that opposition,

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[4] For reasons of both business management and customer experience, many national merchants try to regularize their practices across all stores. Surcharge bans in large states (like New York) thus frequently affect merchant practices in states that do not have such bans, especially because local merchants are unlikely to impose surcharges in competition with large national retailers who do not.

governmental organizations from the Federal Reserve Board to the Federal Trade Commission identified surcharge prohibitions as economically unintelligible, too vague to reasonably administer, and likely to hide the true costs of credit cards from the consumers who control their usage. *Id.*

Merchants opposed some of these surcharge bans as well, but the widespread opposition of consumer advocates and government regulators to surcharge bans indicates that the problem with surcharge prohibitions is not a parochial concern, and that merchants do not resist surcharge bans because they want to somehow profit themselves from fees on consumers. Instead, merchant opposition is driven by the fact that hiding the experience of the swipe fee from consumers—the very people who decide which payment method to use—results in an economic inefficiency whose cost lands on the merchants *and* their customers.

The problem is what economists would call a "negative externality"—a cost that follows immediately from a consumer's decision to use a particular credit card over another form of payment, but that the consumer herself does not immediately experience. When negative externalities are present, a given product or service ends up being more prevalent than it "should" be in the economy: Supply and demand don't come together where they ought to, because the invisible hand of self-interest isn't communicating the full price of the behavior to the person who is choosing it. *See, e.g.*, Areeda & Kaplow, Antitrust Analysis, ¶110 (5th ed. 1997) (highlighting externalities as one circumstance in which competition fails to create efficient outcomes). And that certainly is true of the choices consumers make when they decide to use credit cards: "What most consumers do not know is

that their decision to pay by credit card involves merchant fees, retail price increases, a nontrivial transfer of income from cash to card payers, and consequently a transfer from low-income to high-income consumers." Scott Schuh, et al., Fed. Reserve Bank of Boston, *Who Gains and Who Loses from Credit Card Payments?* 1 (Aug. 2010); https://www.bostonfed.org/media/Documents/Workingpapers/PDF/ppdp1003.pdf1.

Indeed, the "externality" problem in credit card usage is in some respects worse than normal because consumers' incomplete information ends up hurting consumers *themselves*—especially poorer customers who do not qualify for the most lucrative rewards cards or who cannot qualify for any type of credit. It also harms consumers who choose to use debit cards or cash for budgeting or other purposes. The result is a kind of economy-wide tax that is borne in common by all payers of retail prices, whether they are a wealthy executive using an Amex Black Card or a family using food stamps to buy the same gallon of milk at the same price. Accordingly, while most of the spoils of this system accrue to the card companies themselves, they also flow in some small part to high-income consumers who use the most expensive reward cards. Federal Reserve economists have estimated the cross-subsidy at over $2,000 a year, paid disproportionately by the poorest households to wealthy individuals whose cards carry rich reward programs. *Id.*; *see also* Elizabeth Warren, *Antitrust Issues in Credit Card Merchant Restraint Rules*, Tobin Project Risk Policy Working Group 1 (May 6, 2007).

One right way to address a serious externality like this one is to effectively *communicate* the "real" price of an economic choice to the person choosing it. The more vivid the communication, the more likely the person will "internalize" the cost of the choice they are

making. Importantly, when an economic actor like a merchant tries to tie a consumer's price in part to that consumer's own, cost-increasing decision, they are typically not trying to make money on "fees" or "surcharges." More often, they would be much happier to see the consumer avoid the costlier choice altogether. Accordingly, steering efforts like surcharges directed at credit cards are not designed to make money for merchants, but to communicate effectively to customers that credit cards are costly and that those costs show up in the prices consumers pay. The ultimate goal is to *convince* customers, through effective price communication, to make a cheaper choice.

3. Surcharge bans have been a heavy focus for the card companies—and remain quite valuable to them—because there are more and less effective ways to communicate the real costs of the cards to consumers. Theoretically, any "fee" or "surcharge" that tries to get consumers to internalize a negative externality could be reframed as a "credit" off a higher baseline price for making a cheaper choice. Again, theoretically, that credit would be just as likely to encourage consumers towards the cheaper option as a corresponding "penalty" for taking the costlier route. As it turns out, though, this is all too theoretical: In the real world, framing matters—both when it comes to economic choices and political fights.

For example, Congress has long guaranteed merchants the right to offer a "discount" for using cash or the like, and yet the credit card companies have not attacked that legal rule, even as they have doggedly pursued limits on equivalent "surcharges." That is because it would be extremely difficult as a policy matter for the card companies to advocate for a law that makes a "discount" illegal—consumers and legislators would immediately see through that effort to insulate

credit cards from cash competition. But framing higher prices to credit-card users as a "surcharge" makes it possible to advocate for legislation against them because actions that seem to raise consumer prices look bad, even though card users who pay prices inflated by anti-competitive rules—and then do not receive a "discount" for using cash—are effectively worse off in the exact same way.

Relatedly, and more importantly, a wealth of behavioral economics research has demonstrated that mathematically equivalent "surcharges" and "discounts" are viewed quite differently by consumers, so that it remains quite valuable to the card companies to prohibit surcharging even though merchants are free to offer an equivalent cash discount. Although they are merely "different frames for presenting the same price information," Levitin, *Priceless*, 55 UCLA L. Rev. at 1351, surcharges and discounts touch directly on a recognized, "irrational" aspect of human behavior—namely, how people react to perceived gains or benefits as opposed to perceived losses or penalties. Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999); Daniel Kahneman, et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). This research has shown over and over again that "changes that make things worse (losses) loom larger." Kahneman, *Anomalies*, 5 J. Econ. Persp. at 199. People hate to be penalized much more than they dislike foregoing a benefit. This aspect of our human behavioral irrationality is sufficiently pronounced that even manipulating the words we use to describe the same exact practice can be sufficient to trigger it.

In fact, multiple experts have identified this exact effect at work when it comes to surcharges and discounts in the credit-card context in particular. *See, e.g.*, Cass Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 Nw. U. L. Rev. 1295, 1312 (2003) ("[A] company that says 'cash discount' rather than 'credit card surcharge'" will trigger less consumer reaction because it will not harness loss aversion). The bottom line is that "[c]onsumers react very differently to surcharges and discounts." Adam Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006). Because surcharges are perceived as losses, they can activate consumer reactions much more intensely than being informed of discounts that might be foregone by using a card. *Id.*; *see also* Edmund Kitch, *The Framing Hypothesis: Is It Supported by Credit Card Issuer Opposition to a Surcharge on a Cash Price?*, 6 J.L. Econ. & Org. 217, 219-20 (1990); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261-62 (1986); Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behavior & Org. 39, 45 (1980).

In simple terms, the card companies lobbied hard for surcharge bans even though discounts were already permitted precisely because of their reasonable concern that surcharges would be more likely to work against them—that it was more likely to harm the card companies' brands by effectively conveying to consumers that credit cards have costs. Critically for present purposes, credit-card lobbyists expressly recognized that consumer *communication* was at stake: that surcharging hurts the card brands by making "a negative *statement* about the card to the consumer"

and "*talk*[*ing*] *against* the credit industry." *Cash Discount Act, 1981: Hearings on S. 414 Before the S. Banking Comm.*, 97th Cong. 9, 32, 60 (1981). This is to say that the surcharge label has communicative content that the discount label does not precisely because—as the card companies themselves recognized—a surcharge is more likely to cause consumers to associate the added cost with the card itself. And that, of course, is exactly the message that merchants should be able to send if they so choose.

SUMMARY OF ARGUMENT

Perfectly rational economic actors may not care if you call a dual-pricing regime a cash "discount" or a credit-card "surcharge." To human beings, however, it might well make a difference. Framing matters, particularly when it comes to how *prices* are framed for consumers making economic decisions. When sellers disclose prices in true and honest ways, they are communicating information that is essential to their businesses, to their customers, and to the economy. The choice of how to communicate that true and honest price information is speech, it is protected by the First Amendment, and it is essential to the proper functioning of our free-market system. *Va. Bd. of Pharm.*, 425 U.S. at 765.

Surcharge bans thus regulate commercial speech by limiting how merchants convey price information, and thus garbling the message they may want to send. Indeed, that is their only possible effect, because the actual economic practice of imposing separate prices on cash and credit cards is unambiguously *permitted*. The card companies nonetheless lobbied hard to get anti-surcharging laws like the one at issue here on the books, because they prefer the "discount" framing to the "surcharge" one. That is particularly true because

a blanket cash "discount" off card-inflated prices does not allow merchants to spur competition *among* credit cards by imposing *different* surcharges on more expensive or otherwise disfavored cards. The First Amendment protects both the consumers' right to receive true and non-misleading price information, *id.*, and the choices economic speakers make about how to convey it. The First Amendment does not allow government to require speakers to substitute theoretically equivalent words for the ones they believe will best express their message—especially when all that can *possibly* do is garble the message itself.

In fact, the law looks with deep skepticism on regulations (like these) that force actors to deliver their message one way instead of another. For example, the law does not permit the government to force a speaker to express an idea through one particular medium, *see, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); it recognizes that the speaker can choose among the images, symbols, and means of communication that most effectively convey her point, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 647 (1985); and it protects the speaker's right to choose the exact words that convey her message most effectively, even though—or maybe, because—"words are often chosen as much for their emotive as their cognitive force." *Cohen v. California*, 403 U.S. 15, 26 (1971).

Moreover, the First Amendment applies particular skepticism to laws or regulations that affect the public debate by reshaping its terms in ways that favor one side or that deprive the other side of its most effective means of communication. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). Allowing governments to warp the terms of

the public conversation to suit their preferences, or to force others to describe what they are doing in ways that do not match their conception of reality, is a plain regulation of speech that the law must view with healthy skepticism.

Nor should the fact that commercial actors are involved change the First Amendment calculus—truthful communications designed to entice, affect, or even coerce the economic behavior of other economic actors are undoubtedly protected speech to which the balancing-test protections of the First Amendment must be applied. *See, e.g.*, *Claiborne Hardware*, 458 U.S. at 907-11; *Va. Bd. of Pharm.*, 425 U.S. at 757, 764, 770. Indeed, this rule is necessary to protect against government efforts to control the terms on which its *own* commercial policies are debated.

Suppose that the government were to raise the sales tax, while requiring merchants to describe the new rate as a "mandatory contribution to the state education fund" rather than a "tax." Or suppose the government were to forbid imposing sales tax as a separate charge at the register, and instead forced merchants to bake it into general prices, so as to lower the salience of the tax to consumers. The First Amendment violation in that instance would be obvious—the government is targeting the communicative content of a merchant's practices for the government's own ends, cognizant of the extent to which framing matters in how effective speech against its policies will be.

That same rule applies when it comes to a government enforced distinction between discounts and surcharges. In fact, to the extent that there is a difference for consumers between those two descriptions of

the same economic reality—to the extent they *feel* differently about them—that only *confirms* that government should not be choosing between them.

Of course, that is not the end of the matter: The Court must still decide whether this speech restriction might be justified to prevent consumers from being misled by price advertising or the like. Here, we agree with petitioners that both the vagueness of the law and the fact that it does not permit so-called surcharging even under circumstances where deception is impossible must lead to its invalidation under *Central Hudson*'s balancing test.

In the end, the key point is that while many merchants may not *want* to use surcharges rather than discounts (because, among other things, consumers don't like them), they should have the *right* to do so—constrained by the forces of competition and sound business strategy rather than government speech codes. Merchants want to make their purchasers happy: Recognized stores—be they national brands or popular local outlets—have a brand of honesty, integrity, customer service, and competitive pricing to protect. Whatever dual-pricing practices merchants might pursue will be governed by those forces *and* the fact that being a merchant (unlike being a credit card company) is a highly competitive industry. But the choice of how to navigate those concerns while communicating honestly with consumers about credit-card costs is protected by the First Amendment—as is the right of merchants more generally to communicate effectively and honestly to their consumers how other costs end up in the bottom line. Thus, it is essential that this Court affirm merchants' ability to communicate with their consumers in the way that is most likely to get through to them—confirming that economic actors have a right under the First Amendment

to try to influence others' choices by telling *the truth* in the way they choose to do it. This Court should reaffirm that right, and reverse.

ARGUMENT

I. Anti-Surcharging Laws Target Communicative Content Rather Than Conduct

Petitioners' brief effectively demonstrates that state surcharging bans have both the purpose and effect of regulating merchant communication rather than conduct. That is because the effect of these laws is to compel merchants to *describe* their dual prices for cash and credit in a particular way that warps the terms of the public debate and generates particular perceptions of the card companies.

One surefire way of recognizing that surcharge bans regulate speech rather than conduct is to recognize that they do not regulate the underlying economic conduct *at all*. The only identifiable economic "conduct" here is charging one price to use a credit card and another to pay by cash or check. Every single state permits that conduct whether they have a surcharge ban or not. Surcharge bans thus cannot be passed off as regulations of economic activity; they leave that activity utterly unchanged.

In fact, the *only* effect that surcharge bans have on prices when cash discounts are permitted is to suppress critical competitive information that the economy needs to function best. While a blanket cash discount permits dual prices, it does not allow merchants and their consumers to differentiate *among* the various credit cards consumers can use. As the Discover example indicates, *supra* p.7-8, suppressing that information has powerful anticompetitive effects, and prevents the free market from operating as it should.

This effect isn't even one that surcharge laws are intended to create: Respondent has never attempted to justify its law by invoking the need for a uniform, *inaccurate* discount as opposed to an *accurate* surcharge tied to the particular swipe-fee costs associated with particular cards. But that just shows the danger of regulating the *way* in which merchants communicate accurate and non-misleading price information (i.e., surcharge vs. discount), rather than an underlying economic practice (i.e., differential pricing), which these laws seem calculated to permit.

In fact, these laws clearly do regulate the content of merchant communications, in both purpose and effect. That is true in at least three key respects.

First, and most importantly, anti-surcharge laws are fundamentally directed at the effect that truthful information might have on consumers. In *Virginia Board of Pharmacy*, this Court recognized that when price information is regulated because of how consumers might react to it, the government is regulating speech, and must justify that regulation under the First Amendment. *See* 425 U.S. at 765. That justification will be difficult because the free flow of accurate price information is essential to the proper functioning of the free market, *id.*—laws that prevent the most vivid possible communication of how much credit cards cost the economy not only impinge on the free-speech rights of merchants, but on the reciprocal rights of consumers to receive useful economic information. Put otherwise, the gag order on calling a dual pricing regime a "surcharge" doesn't just hurt merchants who want to communicate effectively with their customers, it also hurts their customers, who aren't being told very effectively that they are—in economic reality—being surcharged if they do not pay in cash.

Indeed, to the extent that such regulations are premised on how surcharges affect consumers differently from cash discounts, that only *confirms* that the laws are regulating otherwise protected speech. At bottom, commercial speech doctrine embodies fundamental skepticism towards paternalistic assumptions about "the reactions it is assumed people will have" to true and non-deceptive economic information. *Id.* at 769. Surcharge bans fit neatly within that category because they treat the non-misleading representation that cards are more costly than cash as some kind of inconvenient truth that consumers should not be forced to confront at the register. *See id.* at 770 (courts must "assume that [price] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them"). Masking the way that cards inflate prices by letting them rise and offering cash "discounts" preferences *dis*information over the truth. Ignorance of the real costs of a choice among those who make it is something false-advertising laws—and any sound economic or public policy—is supposed to fight *against*.

Second, surcharging bans have a one-sided effect on the literal "terms" of the public debate around credit cards and the effects that they have on prices and the economy as a whole. In lobbying for such laws, the card companies recognized that a surcharge—much more than a discount—"makes a negative *statement* about the card to the consumer" and "*talk[s] against* the credit industry." *Cash Discount Act Hearings*, at 32, 60 (emphasis added). Meanwhile, states that have banned surcharging have openly relied on the "psychological[]" effectiveness of the "surcharge" framing as a reason to ban it. Framing cards

as *increasing* costs in the retail economy is exactly what merchants like the plaintiffs here are trying to convey; that message is garbled when they are required to frame the use of cash as a benefit rather than the use of credit as a burden. Simply put, at least in their effect (if not their purpose), surcharge bans function as a gag order that prohibits "negative statements about the card to the consumer," as well as "talk[ing] against the credit industry." The way these laws accordingly skew perceptions about credit cards among the public vividly demonstrates that they are regulations of speech, not conduct.

Importantly, that affects not only economic behavior by consumers, but our politics as well. Forcing merchants to "normalize" the inflated prices generated by expensive credit card swipe fees, and then offer positive "discounts" for using cash, predictably minimizes the effects expensive cards have on the economy in the public imagination. When the public cannot see the real cost of an apparently free rewards programs or cash-back offers on their cards, it becomes much harder to make the case for regulating or otherwise addressing their fees—fees that largely pay for corporate profits rather than cardholder rewards. Meanwhile, nothing prevents the card companies from both relentlessly advertising their credit products and generating positive feelings with the public by offering them what appear to be "free" rewards. Merchants must be able to combat that message with their own; and they must be free to communicate on the terms that they believe are most likely to land so long as they are true and non-misleading. Indeed, "unless consumers are kept informed about the operations of the free market system, they cannot form 'intelligent opinions as to how that system ought to be

regulated or altered.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 519 (1996) (Thomas, J., concurring) (quoting *Va. Bd. of Pharm.*, 425 U.S. at 765). The extent to which surcharging bans can manifestly "impede debate over central issues of public policy," *id.* at 503 (plurality), again confirms that they are regulations of speech, not conduct. *See also* Pet. App. 76a (noting "powerful noncommercial valence" of these issues).

Third, the effort to use honest communication in the economic sphere to convince others to change their behavior is speech—often, paradigmatic speech. Consider *NAACP v. Claiborne Hardware*, 458 U.S. at 911, which held that a boycott of white businesses in Alabama was protected speech, notwithstanding the fact that it took the form of economic conduct (refusing to patronize certain businesses) and was intended to influence others or even coerce them to change their ways. *See id.* ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.") (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). To be sure, there is a huge difference between urging businesses to support desegregation and urging consumers to use cash instead of credit, but First Amendment rules cannot depend on value judgments about the content of various forms of speech or advocacy.[5] Instead, the First

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[5] To the extent that such distinctions are permitted at all, it is through the use of the more flexible *Central Hudson* balancing test for commercial speech, rather than the more stringent tests

Amendment recognizes that people have the right to speak through economic actions that have communicative force. State laws that prohibit merchants from doing so by making their communication less effective are clearly regulating their speech, not just their conduct. Put otherwise, the extent to which "surcharging" is calculated to have a stronger effect on the behavior of consumers than "discounting" is a reason to regard it as communicative, just as boycotts aimed at business owners' pocketbooks are communicative—both are protected because they *work* to get the key message across, and encourage others to change their ways.

Indeed, as this Court explained in *IMS v. Sorrell*, the government cannot use the law to "diminish the effectiveness" of truthful, non-misleading communication because the state has determined that it is too powerful, or "because of disagreement with the message it conveys." 564 U.S. 552, 565-66 (2011). A law that works to prevent merchants "from communicating with [consumers] in an effective and informative manner," thereby "diminishing [their] ability to influence [consumer] decisions," is a speech regulation, and must satisfy First Amendment scrutiny. *Id.* at 564, 577.

The reason this is so important to merchants is that pricing-related speech is both (1) often easily characterized as mere economic conduct; and (2) often the single best tool merchants have available to communicate with their customers. It is thus essential that this Court recognize that regulations aimed at

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that have been applied to political speech or the like. The point here, however, is only that such laws clearly regulate *speech* rather than conduct—just as they did in *Claiborne Hardware*—and that a test like *Central Hudson*'s must therefore be applied.

how prices are communicated or framed for consumers remain understood as regulations on speech rather than conduct, notwithstanding the obvious power that the government has over what is bought and sold, and the prices that are paid in those transactions. The law can impose price floors, but cannot force merchants to characterize them as the merchant's chosen prices when they would like to charge less. The law can force merchants to increase their prices by including a sales tax, but it cannot compel them to withhold from consumers the role that tax plays in the prices they pay. The law can forbid merchants from selling certain products at all, but it cannot force them to characterize those products as good or bad or out of stock when that's not what's going on. And most relevant of all, the law can forbid dual prices—it can force merchants to charge only one price if that is what the people's elected representatives want—but it cannot skew the debate around credit card acceptance by only permitting dual prices so long as merchants describe what's happening in the way those representatives (or the card companies' lobbyists) like best.

This can seem like an ironic rule—that, for example, a state could ban all dual pricing but cannot prohibit a surcharge while it allows a discount. But it is vitally important. Price lists and receipts are the main conduit for information about the economy to flow between buyers and sellers; this Court has observed that this information is frequently *more* important than any other in the lives of individuals who are trying to make ends meet. *Va. Bd. of Pharm.*, 425 U.S. at 763 ("As to the particular consumer's interest in the free flow of commercial information, that inter-

est may be as keen, if not keener by far, than his interest in the day's most urgent political debate."). Accordingly, accurate and effectively communicated price information is essential for those individuals to make good economic choices *and* good political choices. When the government forbids economic conduct—say, by outlawing a product or capping a price—the source of the restriction is apparent. But when the government monkeys with the way that *permitted* economic practices are characterized, it obscures the truthful messages that help economic actors decide how to behave in the market, and that help political actors decide how to respond to perceived market failures.

In fact, it's not hard to recognize how a ban on surcharges in this area has affected public perceptions generally. The most proximate result of these prohibitions is that most consumers have *no idea* how expensive credit cards are for merchants to accept, and the consequent costs they impose on the economy. Consider whether, before this very case, it ever occurred to you that choosing to use your credit card rather than cash at your favorite local store is costing the shopkeeper three percent of her revenue on your sale. Or consider whether you understood that using your basic Visa card costs the merchant less than using an American Express Gold Card. Consumers are most likely to learn that reality from effective commercial speech they can see on receipts and experience at the register. Stifling the effective flow of that information does not just abridge the rights of merchants, it interferes with an important mechanism for making the free market work for everyone.

Importantly, if this Court were to reaffirm (as it should) that pricing communication designed to influence consumer choices by effectively conveying truthful price information is speech for First Amendment purposes, it would not in any way limit the government's ability to regulate that influence if it is being deployed to trick or mislead consumers. As explained below, the conclusion that framing the cost of credit as a "surcharge" is speech means that restrictions on that speech are subject, at a minimum, to the balancing test for commercial speech, which both (1) only protects non-misleading speech; and (2) permits the government to pursue a legitimate interest in avoiding possible consumer deception or confusion. Conversely, if this Court were to hold that laws like these regulate conduct, it would be forced to affirm them even if their manifest purpose and effect is to shield consumers from the truth, and to trick them into making bad choices to the benefit of someone else.

In short, because surcharge bans permit merchants to charge dual prices reflecting the cost of credit cards, but prohibit merchants from communicating about those costs in the most effective way, they are speech regulations that must pass First Amendment muster. That is because, while government can certainly control marketplace behavior, it remains subject to the aegis of the First Amendment when its actions affect the terms of our public discourse—be it one about economics, politics, or both. The stakes of this issue extend beyond surcharge bans, to other ways in which government may try to exercise soft pressure on our politics by changing the ways that economic actors share information with consumers about the prices they pay. Accordingly, the most important thing for the Court to affirm in this

case is that the "surcharge" framing at issue here is protected commercial speech.

II. Surcharge Bans Fail Central Hudson

Central Hudson, the basic balancing test for commercial speech, imposes an intermediate form of scrutiny on regulation of such speech. It asks whether commercial speech "concern[s] lawful activity"; whether it is "misleading"; "whether the asserted governmental interest is substantial"; "whether the regulation directly advances the governmental interest asserted"; and whether the law "is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). *Amici* recognize that certain kinds of surcharge bans might theoretically advance a government interest in avoiding a bait and switch for consumers, or in avoiding misleading advertising. The problem for this law is that it does not advance that interest in a fashion that is even remotely well-tailored to the relevant government end.

A basic hypothetical makes this clear. Imagine that a low-cost grocery store airs a television commercial that clearly explains that its prices are kept low by "charging credit card users the costs we pay to accept those cards, so we can pass on the best possible savings to you if you are willing to pay in cash." Indeed, imagine the store specifically encourages users of food stamps to shop there because, "by charging our credit-card customers a higher price, we are able to pass on unbeatable savings to our cash and food-stamp customers." There is nothing remotely deceptive about this advertisement—the consumer knows, far in advance, that the store's prices will be higher if he wants to use a card, and that the store may have

some particularly attractive deals for cash or food stamp purchasers. Yet New York law forbids this advertisement; it simply does not permit a merchant to cure possible confusion with disclosure if the disclosure is that it charges consumers "more" to use a credit card. That approach is both antithetical to the First Amendment's basic premise that the answer to most problems is more speech, not less, and obviously leaves the law ill-tailored to any asserted interest in preventing confusion or deception.

In fact, a "deception" rationale for surcharge bans is completely backwards; the surcharge label communicates the real cost of credit to consumers *more* effectively than a "discount" for using cash. *See* Pet. App. 76a (district court finding that, because surcharges "truthfully and effectively convey[] the true cost of using credit cards, they" "actually make consumers more informed rather than less"). Because surcharge bans create the opposite effect from their asserted benefit, there is simply no way they can satisfy *Central Hudson*.

Ironically, the best proof of the absence of any legitimate governmental interest in preventing surcharges may lie in the fact that, if these laws are invalidated (as they should be), the broader merchant community does not necessarily expect widespread surcharges to result. As the social science discussed at length above indicates, many consumers do not like surcharges—they would rather have higher prices and "free" reward miles for their purchases than have lower prices plus a surcharge that ends up leaving them in the same place. Because surcharging is likely to be unpopular, and the retail business is both highly competitive (unlike the credit card business) and

highly dependent on maintaining a positive reputation with customers, the force of competition may serve as a natural brake on merchants choosing to communicate through surcharges. Moreover, that competition will be an even more effective brake on surcharges that take the form of a bait-and-switch or last-second price increase at the register—a practice that is certain to leave consumers unhappy and unlikely to return. Although even this much is unlikely, the only kind of surcharges merchants might even consider pursuing would be clear that the significant costs imposed by the card companies are the cause of the surcharge in order to avoid consumers blaming merchants for costs they do not control. Accordingly, the only thing that surcharge bans are likely to suppress is true, transparent, and non-misleading information about the costs created for consumers when they use their credit cards.

In addition, the fact that widespread surcharges may be unlikely even without these laws proves two critical points about why merchants should nonetheless have the right under the First Amendment to choose to use the surcharge label if they so choose. First, the fact that consumers really do not like surcharges shows that they are *effective*—rather than *deceptive*—in communicating the key price information about credit cards to consumers. The First Amendment protects a speaker's choice of words even if they are "chosen as much for their emotive as their cognitive force," *Cohen*, 403 U.S. at 26, and the government has no business suppressing the most palpable form of connection a commercial speaker can make between credit cards and increased costs.

Second, the fact that merchant surcharges will be constrained by competition shows that what the credit-card industry really needs is more competition rather than less. As explained at the outset, a surcharge ban is a kind of anti-steering rule that effectively suppresses horizontal, interbrand price competition among the card companies over merchant swipe fees. (It also suppresses potential competition among merchants over whether to surcharge or not, as in the case of the hypothetical low-cost grocer above, *see supra* p.28.) A commercial speech regulation whose primary effect is to suppress the flow of accurate price information and thus limit effective free-market competition is a paradigmatic violation of *Central Hudson*. *See 44 Liquormart*, 517 U.S. at 503-04. Given that the credit-card market is already far less competitive than the retail market, it is particularly unjustifiable for the government to enact a commercial speech regulation that makes it even harder for merchants to spur competition among the card companies—protecting those already ironclad brands against "negative statements" that might make a difference in both the economic marketplace and the marketplace of ideas.

In the end, though, this is not just about surcharges—it is about the right of commercial actors to characterize their pricing practices in concededly accurate and non-misleading ways that are nonetheless calculated to get their point across to consumers. The Court should reaffirm here that the First Amendment protects that right, for the sake of the speaker, the listening consumer, and the market as a whole.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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